



**SO ORDERED.**

**SIGNED this 05 day of January, 2009.**

*Janice Miller Karlin*  
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**JANICE MILLER KARLIN**  
**UNITED STATES BANKRUPTCY JUDGE**

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE:** )  
**DOUGLAS LEE KELLISON and** )  
**JULIE KAY KELLISON,** )  
 )  
**Debtors.** )  
\_\_\_\_\_ )

**Case No. 08-40480**  
**Chapter 7**

**ORDER DENYING MOTION TO VACATE**

This matter is before the Court on Debtors' Motion to Set Aside Discharge for the Purpose of Filing and Approving the Reaffirmation Agreement and Reinstate Discharge.<sup>1</sup> On April 17, 2008, Debtors filed this Chapter 7 petition. The 11 U.S.C. § 341<sup>2</sup> meeting of creditors was scheduled and held on May 20, 2008, and the last day for opposing discharge was set as July 21, 2008. When no one filed such an objection, the Court entered a discharge order pursuant to Fed. Rule Bankr. P.

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<sup>1</sup>Doc. 17.

<sup>2</sup>This case was filed after October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective. All statutory references are thus to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101 - 1532 (2005), unless otherwise specifically noted.

4004.<sup>3</sup> The discharge was granted on August 5, 2008. Seven weeks later, on September 25, 2008, Debtors filed the instant motion.

Debtors did not provide any statutory or other legal support for the relief they requested, and a very brief review of available case law indicated that the Court likely lacked the legal authority to set aside a discharge order to allow a debtor to file a reaffirmation agreement. On November 14, 2008 the Court issued an order requiring Debtors to file a brief providing legal support for their request to set aside the discharge order, which brief was timely filed. Specifically, the Court requested Debtors address a recent holding out of the Central District of Illinois, *In re Golladay*,<sup>4</sup> in which that court denied the very relief requested by Debtors in this case.

Debtors' brief in support of their motion to vacate their discharge sets forth two legal theories upon which they claim the requested relief is proper. First, Debtors claim that good cause exists pursuant to Fed. R. Bankr. P. 9024 to set aside the discharge order as a result of excusable neglect of counsel. Second, Debtors rely upon *Ackermann v. United States*<sup>5</sup> to support their position that the Court has the authority to find that extraordinary circumstances exist that would allow the Court to set aside its prior order. Debtors' counsel claims such extraordinary circumstances exist because the reaffirmation agreement was inadvertently misplaced in his office, and was not discovered until after the entry of discharge.

Although Debtors' brief does address the issues raised in *Golladay*, the Court's research reveals other authority that the Court finds more persuasive, and has determined that it disagrees

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<sup>3</sup>Rule 4004 requires the Court to "forthwith" grant the discharge when all prerequisites for discharge are met.

<sup>4</sup>391 B.R. 417, 422-23 (Bankr. C.D. Ill. 2008).

<sup>5</sup>340 U.S. 193, 199-202 (1950).

with certain portions of the *Golladay* decision. In particular, the Court finds that Fed. R. Bankr. P. 9024 does not allow the Court to set aside a discharge order under the facts of this case, even though that option was mentioned as a possibility in *Golladay*.<sup>6</sup>

Instead, the Court finds the reasoning set forth in *In re Engels*<sup>7</sup> to be more persuasive on this issue and adopts the legal analysis in that opinion. In *Engels*, the court analyzed the requirements for creating a valid, enforceable reaffirmation agreement, including the fact that the Code requires a reaffirmation to be made prior to the entry of discharge order.<sup>8</sup> The court then discussed the same arguments Debtors make here, including that the court should utilize its authority under Fed. R. Bankr. P. 9024 (which incorporates Fed. R. Civ. P. 60(b)), to exercise its equitable powers to set aside the discharge order so that Debtors can file the reaffirmation agreement. The court held that, pursuant to § 727(d) and (e), only the case trustee, a creditor, or the U.S. Trustee has standing to seek a revocation of a debtor's discharge.<sup>9</sup> Further, the court held that Rule 9024 cannot be used to circumvent a clearly stated substantive provision of the Bankruptcy Code, such as the limitations on standing for bringing an order revoking discharge found in § 727.

The Court adopts the reasoning and conclusions reached by the court in *In re Engels*, and finds that the Debtors lack the authority to set aside their discharge in this case. The procedures for revoking a discharge are clearly set forth in § 727(d) and (e), and neither of those subsections allow a debtor to seek revocation of his or her own discharge in order to file a reaffirmation agreement.

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<sup>6</sup>*Golladay*, 391 B.R. at 423-24.

<sup>7</sup>384 B.R. 593 (Bankr. N.D. Okla. 2008)

<sup>8</sup>*Id.* at 596 (citing 11 U.S.C. § 524(c)(3) and *In re Herrera*, 380 B.R. 446, 450 (Bankr. W.D. Tex. 2007)).

<sup>9</sup>*Id.* at 598-99.

Although Rule 9024 may facially appear to provide the Court with the authority to amend its prior order granting the Debtors' discharge, a bankruptcy rule may not circumvent clear statutory provisions, including the specific limitations on the identity of persons eligible to bring a motion to revoke a discharge expressly enumerated in § 707(d) and (e).<sup>10</sup>

Allowing Debtors to set aside their discharge order after failing to timely file a reaffirmation agreement would directly circumvent both the mandate in § 524(c)(1) that requires such agreement be made prior to the entry of discharge, as well as those in § 707(d) and (e) that specifically limit those individuals or entities with standing to revoke an order granting discharge. To grant the relief requested in this motion would essentially write the requirements of those specific statutory provisions out of the Bankruptcy Code. The Court will not, and in fact finds that it cannot, utilize the general provisions of Rule 9024 or its general equitable powers to grant the relief requested in this motion.<sup>11</sup>

**IT IS, THEREFORE, BY THE COURT ORDERED** that the Debtors' Motion to Set Aside Discharge for the Purpose of Filing and Approving the Reaffirmation Agreement and Reinstate Discharge<sup>12</sup> is denied.

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<sup>10</sup>See *In re Asay*, 364 B.R. 423, 426 (Bankr. D. N.M. 2007) ("The Federal Rules of Bankruptcy Procedure are not the equivalent of statutory law, and when there is an apparent conflict between the Rules and the Code, the Code prevails."). See also 28 U.S.C. § 2075 (implements the Federal Rules of Bankruptcy Procedure and states that "[s]uch rules shall not abridge, enlarge or modify any substantive right." ).

<sup>11</sup>Even if the Court did have the ability to set aside the discharge order under Rule 9024, the Court finds that the facts of this case do not rise to the "extraordinary" circumstances necessary to justify setting aside the discharge order. See *Golladay*, 391 B.R. at 423 (holding that "a debtor seeking relief under this Rule must show 'extraordinary' circumstances which prevented relief through usual channels) (citing *Ackermann v. U.S.*, 340 U.S. 193 199-202 (1950)). The explanation given by Debtors for the delay in timely filing the reaffirmation, although understandable, are not sufficiently "extraordinary" to warrant the relief requested. This is especially true given the fact that Congress expressly placed numerous procedural hurdles in the path of effectuating a binding reaffirmation agreement, with the apparent intent to protect debtors. See *In re Schott*, 282 B.R. 1, 7 (10th Cir. BAP 2002).

<sup>12</sup>Doc. 17.

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